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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 559.

WILLIAM D. DRISCOLL,
Petitioner,

vs.

TOLEDO BLADE COMPANY,
Respondent.

PETITION FOR REHEARING.

WILLIAM D. DRISCOLL,
1111 Edison Building,
Toledo, Ohio,
Attorney for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE 621-8647

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JURISDICTION FOR PETITION FOR REHEARING.

This petition is submitted by leave of Rule 58, paragraph 2 of the Rules of the United States Supreme Court which provides therefor where there are intervening circumstances of substantial or controlling effect.

ISSUE.

The petition for writ of certiorari in this case was filed on September 15, 1966, submitting the following salient issues:

1. In a case where the petitioner obtained a verdict and judgment and where it was alleged and proven by the preponderance of the evidence that the defamatory falsehoods were published knowingly, intentionally and deliberately concerning a judge in his profession, does the First Amendment to the United States Constitution regard-

ing freedom of speech and press, as interpreted by this Court in *New York Times Company v. Sullivan,* 376 U. S. 254, vitiate the provisions of the Fourteenth Amendment, Section 1, to the United States Constitution, which guarantees to all persons security in their property, including their reputations?

Petitioner says, no. Respondent says, yes.

2. Did this Court in *New York Times Company v. Sullivan,* 376 U. S. 254, hold, and does this Court now hold, that proof of actual malice must be by a greater weight or degree than the preponderance of the evidence?

Petitioner says, no. Respondent says, yes.

INTERVENING CIRCUMSTANCES.

Intervening the docketing of this case in this Court on September 15, 1966 and dismissal thereof on November 14, 1966, this Court on October 10, 1966 admitted for review *Curtis Publishing Company v. Butts,* Docket No. 37 and *Associated Press v. Walker,* Docket No. 150. Both cases present the same salient issues as in the instant case. In this connection, Rule 23-1(c), pertinent to what issues this Court will consider in a petition for certiorari, provides:

> "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

In *Curtis Publishing Company v. Butts,* Docket No. 37, admitted for review on October 10, 1966, the issue presented for review is whether the First Amendment provides immunity for false, defamatory statements published with knowledge that they were false concerning an athletic director, and falsely stating in substance that the said athletic director of a state university gave to a football

coach of another state university confidential information calculated to affect the outcome of a forthcoming football game between the two universities.

The issue accepted for review by this Court on October 10, 1966 in *Associated Press v. Walker*, Docket No. 150, is whether the rule in *New York Times Company v. Sullivan*, 376 U. S. 254, requiring proof of actual malice, that is, that the false and defamatory publication was made with knowledge that it was false or with reckless disregard of whether it was false or not, applies to persons other than public officials.

In all three cases, the *Butts* case, the *Walker* case, and the instant case, there is a confrontation of the rights of publishers of false, defamatory statements published with actual malice—that is, with knowledge that they were false or with reckless disregard of whether they were false or not, as against the provisions of the Fourteenth Amendment, Section 1, to the Constitution of the United States guaranteeing security to all persons in their property, including their reputations.

PRECEDENT FOR REVIEW OF THE RECORD.

The petition for certiorari in the instant case is directed to the Supreme Court of Ohio. In similar cases this Court has held that where constitutional questions are involved, this Court will examine the trial record to determine whether the constitutional standards appear in the record. This Court examined the trial record in *New York Times Company v. Sullivan*, 376 U. S. 254, and stated at page 285:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."

This Court further stated in footnote 26 to *New York Times Company v. Sullivan*, 376 U. S. 254, at page 285:

"26. The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that 'no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law,' *is applicable to state cases coming here.* Chicago, B. & Q. R. Co. v. Chicago, 166 US 226, 242-243; cf. The Justices v. Murray, 9 Wall. 274. But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. *'(T)his Court will review the findings of fact by a state court * * * where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'* Fiske v. Kansas, 274 US 380, 385-386. See also Haynes v. Washington, 373 US 503, 515-516." (Emphasis supplied.)

ARGUMENT.

The impact of *New York Times Company v. Sullivan*, 376 U. S. 254, requires clarification, particularly in relation to the Fourteenth Amendment, Section 1, as to the rights of persons victimized by publishers of defamatory, false publications concerning them in their profession. This is evident from the record and opinion in the instant case. It is evidenced also in the fact of this Court's orders granting review of *Curtis Publishing Company v. Butts*, Docket No. 37, and *Associated Press v. Walker*, Docket No. 150, which cases this Court has bracketed for argument.

The present status of the law of libel is in a state of confusion. In *New York Times Company v. Sullivan*, 376 U. S. 254, at page 279, this Court stated in the opinion by Mr. Justice Brennan:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The question still remains whether the converse of the above proposition is effective, that is, whether a public official has a right of recovery against a publisher of false, defamatory statements published with knowledge that they were false or with reckless disregard of whether they were false or not. This question is in issue in the *Butts* case, *supra*, the *Walker* case, *supra*, and in the instant case.

In the instant case the petitioner alleged and proved by at least the preponderance of the evidence, that the defamatory statements concerning him in his profession as judge were false and were published by the respondent

with knowledge that they were false, that is, with actual malice.

The trial court charged the jury several times that the plaintiff had a right to recover against the respondent only if, by the preponderance of the evidence, they found the respondent published the statements complained of and if they found also, by the preponderance of the evidence, that the statements were defamatory and false concerning the petitioner in his profession and were published by respondent with actual malice—that is, with knowledge they were false or with reckless disregard of whether they were false or not. The jury found for petitioner and the trial court entered judgment on the verdict.

CONCLUSION.

In compliance with part 2 of Rule 58 and because of the intervening decisions of this Court in allowing review of *Curtis Publishing Company v. Butts,* Docket No. 37, and *Associated Press v. Walker,* Docket No. 150, which cases are still pending to be considered by the Court in tandem, as well as the reasons previously advanced in support of the petition for certiorari, it is urged that this petition for reconsideration should be granted, the order denying certiorari should be vacated, and certiorari should be granted for hearing in conjunction with the *Curtis Publishing Company v. Butts* and *Associated Press v. Walker.*

Respectfully submitted,

WILLIAM D. DRISCOLL,
1111 Edison Building,
Toledo, Ohio,
Attorney for Petitioner.

Certificate of Counsel.

Pursuant to Rule 58, I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to substantial grounds not previously presented by this petitioner.

WILLIAM D. DRISCOLL.